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No. 00-1813

In The
SUPREME COURT OF THE UNITED STATES

ZEINAB ALI,
Petitioner,

v.

ALAMO RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

(1) The parties appear to be in agreement as to the holding of the Fourth Circuit. Respondent correctly describes the controlling Fourth Circuit decision in *Chalmers v. Tulon Co. of Richmond*, 101 F. 3d 1012 (4th Cir. 1996), as requiring proof in a religious accommodation case that the employee "was disciplined for failing to comply with the conflicting employment requirement." (Br. Opp. 12). Under that standard the allegation that petitioner had been forced to abandon wearing her hijab at work was insufficient as a matter of law; "[a]bsent some form of discipline or negative consequence, Petitioner could not establish a *prima facie* case necessary to trigger the burden-shifting obligations of accommodation." (Br. Opp. 9).

Respondent firmly defends the holding of the Fourth Circuit:

> Petitioner does not seek redress for actual and identifiable harm related to the terms and conditions of her employment, but rather for alleged harm to her faith. This, however, is antithetical to the very purpose of the anti-discrimination statutes.

(Br. Opp. 15). Indeed, respondent suggests that any purportedly religious worker who violated her professed religious obligations merely because ordered to do so by her employer probably was not sincere in the first place.

> [T]he framework for protection of an employee's religious beliefs is predicated on the fact that the employee holds a "sincere" or "bona fide" religious

> belief. The approach advocated by Petitioner would effectively ignore this requirement and allow an individual who neither stuck to her religious beliefs nor suffered employment consequences of any kind, to nonetheless seek redress.

(Br. Opp. 15). In any event, respondent urges, the federal courts are simply too busy to entertain claims by religious employees who failed to defy their employers and incur disciplinary action. (Br. Opp. 18).

The fact that the court of appeals opinion in this case is unpublished does not render certiorari inappropriate. This Court routinely grants certiorari to review unpublished opinions.[1] The underlying Fourth Circuit precedent in *Chalmers* is both published and binding precedent in that circuit.

(2) The inter-circuit conflict on this issue is inescapable. There is no dispute that a Title VII plaintiff *may* establish a prima facie case by showing that he or she was disciplined for refusing to abide by an employer's non-accommodating rule. The Fourth Circuit, however, insists that this is the *only* method of establishing an accommodation claim--that proof of discipline is

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[1] *E.g., Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Services, Inc.*, 121 S.Ct. 1835, 1838 (2001); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678, 1682 (2001); *Carter v. United States*, 530 U.S. 255, 260 (2000); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999).

not only sufficient but also necessary to establish a prima facie case.

Respondent insists this Court and all the circuit courts to address this issue agree with the Fourth Circuit. But respondent mischaracterizes many of the opinions in question.

In *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), this Court summarized the Second Circuit decision in that case as having held

> that a prima facie case of discrimination *is established* when an employee shows that "' . . . he or she was disciplined for failure to comply with the conflicting employment requirement.'"

479 U.S. at 65-66 (emphasis added) (*quoting Philbrook v. Ansonia Board of Education*, 757 F. 2d 476, 481 (2d Cir. 1985), *quoting Turpen v. Missouri-Kansas-Texas R. R. Co.*, 736 F. 2d 1022, 1026 (5th Cir. 1984)). The quoted passage from this Court's opinion does not assert that this is the sole way to establish a prima facie case, but only that (the Second Circuit had held) it is a permissible method of doing so. Respondent, however, describes this Court's decision in *Philbrook* as holding[2] that

> the framework for a prima facie case . . . *requires* an employee to show " . . . he or she was

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[2]The quoted passage, in any event, is not part of either the holding or the reasoning of the Court in *Philbrook*. It is simply a summary of the proceedings in the lower courts prior to the grant of certiorari.

> disciplined for failure to comply with the conflicting employment requirement."

(Br. Opp. 11) (Emphasis added). But the word "require" simply is not in the decision of this Court in *Philbrook*, in the decision of the Second Circuit in *Philbrook*, or in the decision of the Fifth Circuit in *Turpen*.

Respondent's summary of the decisions in circuits other than the Fourth is also incomplete. For example, in *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 614 n. 5 (9th Cir. 1988), the Ninth Circuit in fact expressly rejected the Fourth Circuit rule, holding to the contrary that "[a]n employee does not cease to be discriminated against because he temporarily gives up his religious practices and submits to the employment policy." Respondent makes no mention of this actual holding, instead insisting that under *Townley,* "[p]etitioner would *be required* to plead and prove that she 'was *penalized* in some way because of the conflict' (emphasis supplied). *Townley*, 859 F. 2d at 614 n. 5." (Br. Opp. 14). This partial quotation omits the immediately following sentence in *Townley*, which adds that "[t]he *threat* of discharge (or of other adverse employment action) is a sufficient penalty." 859 F. 2d at 614 n. 5 (Emphasis in original).

Respondent's summary of decisions in other circuits is in other instances overstated. *Compare Beadle v. City of Tampa*, 42 F. 3d 633, 636 n.4 (11th Cir. 1995) (defendant "does not dispute" that plaintiff's evidence, including showing of discipline, was sufficient to establish a prima facie case) *with* Br. Opp. 12 (under *Beadle* "prima facie case of religious discrimination *requires*" proof of discipline) (emphasis added); *compare Toledo v. Nobel-Sysco, Inc.*, 892 F. 2d 1481, 1486 (10th Cir. 1989) (quoting the passage from *Turpen* quoted by this Court in

Philbrook) ***with*** Br. Opp. 13 (under *Toldeo* "employee ***must*** prove" discipline) (emphasis added); ***compare*** ***Smith v. Pyro Mining Company***, 827 F. 2d 1081, 1085 (6th Cir. 1987) (prima facie case "is established" where a plaintiff, ***inter alia***, shows he was disciplined) ***with*** Br. Opp. 13 (under *Smith* "employee ***must*** show" discipline) (emphasis added).

(3) Respondent's efforts to distinguish this Court's sexual harassment decisions are unavailing. If Alamo had insisted that Ms. Ali do her work topless, there would be no question that such a requirement discriminated on the basis of gender. The violation inherent in a requirement that she work hijab-less is no different.

Respondent asserts that Ali "concedes that the terms and conditions [of her employment] were not violated." (Br. Opp. 17). That is not correct. What we conceded below was that there had been no "adverse employment action" as that phrase is construed in the Fourth Circuit, i.e. no dismissal or demotion. The difference goes to the heart of the issue in this case. The precise question decided by the Fourth Circuit, and raised by the petition, is whether refusing to permit a worker to engage in a religious practice--absent a disciplinary adverse employment action--constitutes discrimination in the terms and conditions of employment.

(4) Respondent appears to contend that the complaint failed to allege that Alamo had forbidden Ali to wear her hijab. But the complaint assuredly contains precisely that allegation. It describes petitioner as "a Muslim woman who was refused permission to wear a religiously-mandated head scarf at work" (Br. Opp. App. 1a ¶ 1). It characterizes as "intentional . . . and motivated by anti-Muslim sentiment" "Cooper's prohibition, on

behalf of Alamo, of Ms. Ali's wearing her head scarf." (Br. Opp. App. 3a ¶ 12). The complaint asserts "Ms. Ali complained of Mr. Cooper's prohibition to him and to his superiors at Alamo", but to no avail. (Br. Opp. App. 4a ¶ 13). And it explains that "Ms. Ali's acquiescence in Mr. Cooper's demand was in derogation of her religious obligations as she understood them." (Br. Opp. App. 3a ¶ 11).

Respondent apparently contends that what actually occurred in this case was that Cooper thoughtfully assured Ali that she could wear her hijab, and that he graciously accommodated her desire to dress differently than other workers by assigning her to a new job. (Br. Opp. 8-9). If Alamo can prove at trial that those are indeed the facts, it may prevail, although the supposed accommodation looks suspiciously like segregation on the basis of religion. But Alamo's description of what occurred is assuredly at odds with the express allegations of the complaint--that Cooper actually forbad the wearing of the hijab, and that his superiors refused to overturn that prohibition.

On a closer reading respondent may actually be asserting, not that there was no prohibition against wearing a hijab, but only that no Alamo official expressly told Ali that the sanction for violating that rule would be dismissal. (Br. Opp. 3, 8, 9). But such a contention, even if ultimately sustained by the trier of fact, is legally irrelevant. Any direction from a supervisor to a subordinate carries with it an unspoken threat of sanction; workers are fired every day for insubordination, and legitimately so. Employees such as Ali are not required to defy a directive until they are able to precipitate a specific threat of dismissal (or any other particular sanction); employers may well chose to fire such workers without issuing any such warning.

(5) Finally, respondent contends that some sort of procedural default occurred in this case. Alamo made this argument in the Fourth Circuit, but to no avail; the court of appeals instead proceeded to reach the merits of Ali's claims. If this Court were to grant certiorari and hold that Ali's complaint indeed alleged a violation of Title VII, respondent would be free to renew this procedural objection on remand.

The default argument, moreover, is palpably without merit. The complaint in this case alleges that Ali was compelled to stop wearing her hijab at work. The district judge concluded that under Fourth Circuit precedent such an allegation was legally insufficient. (Pet. App. 13a). The judge then granted Ali leave to amend her complaint to include the additional allegation required by that Circuit--that Ali, because she wore her hijab, had been fired, demoted, or otherwise penalized in a manner that constituted an "adverse employment action." (Pet. App. 14a). Ali's attorney declined to amend the complaint in this manner because no such "adverse employment action" had occurred.

Having filed a complaint squarely alleging that she had been forced to violate her religious beliefs rather than risk an adverse employment action, petitioner cannot conceivably be said to have then waived that claim when she declined an invitation to submit an amended complaint making the very different allegation that she had in fact been subject to such an adverse employment action. Federal litigants are not required to plead unprovable facts--in presumptive violation of Rule 11, Fed.R.Civ.P.--in order to preserve a separate meritorious claim.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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